Michael O. Leavitt
Governor
John R. Njord
Executive Director
Carlos M. Braceras
Deputy Director

State of Utah
DEPARTMENT OF TRANSPORTATION

4501 South 2700 West
Salt Lake City, Utah 84119-5998
801-965-4000
Fax: 801-965-4338
www.dot.state.ut.us

April 2, 2002

Republic Outdoor Advertising L.C.
Mr. Dan Ford
825 North 300 West #160
Salt Lake City, UT 84103

SUBJECT: Billboard located at approximately 400 North, Orem, UT

Dear Mr. Ford:

Enclosed are the Findings with respect to the hearing held March 26, 2002. I appreciate your time and effort in working with us in this matter.

Sincerely,

David K. Miles

David K. Miles, P.E.
Operations Engineer

cc: Mark Burns
Barry Sawsak
Terry Stowell
Jim Beadles
Windy McLean
Wade Budge

file

FINDINGS AND ORDER

Republic Advertising v. UDOT, Region Three Permits

INTRODUCTION AND FINDINGS

On March 26, 2002, Administrative Hearing Officer, David Miles, convened a hearing at the Calvin Rampton Complex to consider Republic Advertising's appeal of an outdoor advertising permit denial. Present at the hearing, in addition to the Hearing Officer were Mark Burns, Assistant Attorney General, representing the Region, Barry Sawsak, Region Three Permits Officer, and Terry Stowell, Region Three. For Republic Advertising, Dan Ford and Stewart Grow were present. Also attending the hearing were Windy McLean of Simmons Outdoor Advertising and her attorney, Wade Budge. UDOT Legal Counsel, James H. Beadles, was present to assist the Hearing Officer.

Republic requested a permit for a billboard at Milepost 299.11 on I-15, approximately 400 North in Orem, Utah. UDOT, Region Three, denied the permit for three reasons, the first two essentially being that there was an existing permit at the same location and there was a dispute over the ownership of the land upon which the billboard is to be built. The third issue dealt with the definition of "acceleration and deceleration lanes" and the treatment of those lanes in state and federal law. Prior to the hearing, Republic and Simmons had disputed ownership of the land underlying the proposed billboard. At the hearing, however, they jointly presented an agreement by which they would lease the property together. After some discussion, all parties agreed that this lease constituted a significant change from the circumstances as they initially appeared to the Permits Officer.

Regarding the third issue, it also appeared that circumstances had changed since Republic made its application. Assistant Attorney General Burns stated that UDOT is in the process of adopting a new administrative rule that would construe the meaning of "acceleration and deceleration lanes" more in accordance with the apparent intent of the legislature. Previously, this term had not been defined either in the Utah/Federal Agreement, state law, or state administrative rule. However, the term was significant because those lanes are exempted from the definition of interchange. Consequently, the prohibition on advertising within 500 feet of an interchange should not apply to stretches of road that are acceleration or deceleration lanes.

On behalf of Simmons and Republic, Mr. Budge made a sound argument that the proposed administrative rule was already compelled by state statute. Consequently, the rulemaking process, while necessary to carry out rulemaking mandates, was not needed to give the substance of the rule the force and effect of law. In other words, Simmons and Republic claimed that they were entitled to the benefit of the proposed rule now because it is actually required by statute; therefore, they should not have to wait until formal rulemaking has concluded to take advantage of its more liberal provisions.

Although an interesting legal argument, I do not need to decide whether the new rule simply implements current statutory mandates or creates a new legal mandate. Given the pendency of this new proposal and, with it, UDOT's implicit admission that previous practices were incorrect, this issue can be resolved simply by looking at the equities of the matter. Now that UDOT recognizes the impropriety of its denying a permit in these circumstances and takes appropriate and laudable steps to prevent it from occurring again,

it would be incongruous to deny Republic the benefit of that evolution merely because the appellate hearing was held before, instead of after, the formal rule adoption.

ORDER

I uphold Region Three's denial of the permit based on the information then before the permits officer. However, given the information presented at the hearing, I will allow Republic to resubmit its application. Republic shall provide to the permits officer all information normally necessary to process a permit request and, in addition, a certified copy of the lease agreement that was presented at the hearing. This opportunity to resubmit is not an order to the permits officer to issue a permit, but merely to re-examine the application based on the new information before it and, if the new information is true and correct, to accept Republic's claim that it has a valid ownership interest in the land and then to go on to other parts of the application review process.

The permits officer should also evaluate whether Simmons or Republic can withdraw from the lease agreement. If so, the Hearing Officer would not consider it improper to condition use of the permit on either (1) the existence of a valid, binding agreement between Republic and Simmons and a requirement that Republic notify UDOT as soon as the current agreement is invalidated or terminated; or (2) an indemnity and hold harmless clause from Republic and Simmons that would prevent UDOT from being sued for issuing a permit in circumstances of potentially disputed ownership. Issuance of new permit contingent on surrendering of existing permit. Two permits at the same location is not allowed.

Region Three's third ground for denial, i.e., 500 feet within an interchange, is reversed. For purposes of this case, UDOT Region Three shall operate under the provisions of the proposed rule (a copy of which is attached). Since all parties agreed that the proposed sign location would be acceptable under the new rule, Region Three does not need to examine this issue further.

The Utah Administrative Procedures Act (UAPA) and Utah Admin. Code R907-1 provides for agency reconsideration. If you seek reconsideration of this decision, you must file a petition within 10 days showing the reasons you believe a change in the ruling is appropriate. You also may appeal this decision *de novo* to state district court pursuant to UAPA by filing a complaint in court within 30 days of issuance of this decision. A petition for reconsideration does not prevent future filing of a complaint if the appellant is not satisfied with the final agency order.

DATED THIS 2nd April 2002.

David K. Miles
Administrative Hearing Officer